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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

7 BRET C. KIFER and JENNIFER A.  
8 KIFER,

9 Plaintiffs,

10 v.

11 AMERICAN FAMILY MUTUAL  
INSURANCE COMPANY,

12 Defendant.

CASE NO. 13-6085 RJB

ORDER ON DEFENDANTS  
RENEWED MOTION FOR  
PROTECTIVE ORDER AND  
PLAINTIFFS' RENEWED MOTION  
TO COMPEL

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14 This matter comes before the Court on Plaintiffs' Renewed Motion to Compel Production  
15 of Documents from Defendant (Dkt. 86) and Defendant American Family Mutual Insurance  
16 Company's ('American Family') Renewed Motion for Protective Order (Dkt. 88). The Court has  
17 considered the pleadings filed in support of and in opposition to the motions and the file herein.

18 This case arises from an insurance coverage dispute following a November 3, 2012 fire at  
19 Plaintiffs' personal residence. Dkt. 1. At the time of the fire, Plaintiffs had an insurance policy  
20 with Defendant, policy number 46-BD7584-01. Dkt. 18-1. Plaintiffs make claims for breach of  
21 contract, for violations of the duties of good faith and fair dealing found in the Washington  
22 Administrative Code ('WAC') 284-30-330 pursuant to the Insurance Fair Conduct Act, RCW  
23 48.30.010, *et seq.* ('IFCA'), and for violations of Washington's Consumer Protection Act ('CPA')  
24 RCW 19.86, *et seq.* Dkt. 72.

1 The instant motions are partial renewals of prior motions that were denied without  
 2 prejudice. Dkt. 82. Plaintiffs now renew, in part, their motion to compel certain documents  
 3 listed in Defendant's Third Supplemental Privilege Log. Dkt. 86. Defendant renews a motion for  
 4 the issuance of an order protecting it from having to produce those documents. Dkt. 88.

### 5 **RELEVANT FACTS**

6 The background facts are in the February 10, 2015 Order on Defendant's Motion for  
 7 Partial Summary Judgment and Plaintiffs Motion for Leave to Amend Complaint (Dkt. 62, at 2-  
 8 5) and are adopted here. That order denied Defendant's motion for a ruling that Plaintiffs' claims  
 9 based on the WAC violations pursuant to the IFCA be dismissed because there has been no  
 10 denial of coverage and granted Plaintiffs' motion for leave to amend their complaint to add a  
 11 claim for violation of the Washington State Consumer Protection Act, RCW 61.24.127(a)(b). *Id.*  
 12 Plaintiffs filed their First Amended Complaint on February 18, 2015. Dkt. 72.

13 On February 16, 2015, Defendant moved for the issuance of an order protecting it from  
 14 having to produce documents which were generated after October 2, 2013 (the date Plaintiffs  
 15 notified the Washington State Insurance Commissioner of their complaint against Defendant)  
 16 and which were withheld as privileged because they were attorney-client materials, work product  
 17 materials and/or created in anticipation of litigation. Dkt. 63. Defendant alternatively asserted  
 18 that those documents generated after November 1, 2013 (the date Plaintiffs' filed this case) and  
 19 which it asserted were privileged should be protected. *Id.* Plaintiffs did not directly respond to  
 20 the motion for protective order, but, instead filed a Motion to Compel (Dkt. 67). In that motion  
 21 to compel, Plaintiffs sought, in part, an order compelling Defendant to produce bates stamped  
 22 documents #21, #62, #82 and #83. Dkt. 67. Plaintiffs also moved for an order compelling  
 23 Defendant to produce the documents identified in pages 4-7 of Defendant's Supplemental

1 Privilege Log. Dkt. 67. In its Supplemental Privilege Log, Defendant asserted “attorney–client  
 2 privilege, anticipation of litigation and work product” as to each of these documents. Dkt. 68-3, at  
 3 2-7.

4 On March 16, 2015, both motions were denied. Dkt. 82. In regard to these motions, the  
 5 order provided:

6 Defendant’s motion for a protective order as to (Dkt. 63) should be denied without  
 7 prejudice. The Court is unable to discern under the current record, whether any of  
 8 the documents at issue are protected by the work product doctrine. None of the  
 9 documents were filed in support of the motion, under seal (See Local Rule W. D.  
 10 Wash. 5(g)), or otherwise. Moreover, Plaintiffs have pointed out that the  
 11 Defendant’s Supplemental Privilege Log is not sufficiently clear as to  
 12 all the entries. Descriptions such as “American Family Claims File Log after  
 10/02/12–Date of IFCA Suit Notice” or “Document/image log note after 10/02/12–  
 13 Date of IFCA Suit Notice” are not enough to determine whether the doctrine  
 14 applies. Defendant has not yet shown good cause for issuance of a protective  
 15 order. Plaintiffs’ blanket motion to compel all of these documents (Dkt. 67)  
 16 should also be denied without prejudice. Certain entries in the Defendant’s  
 Supplemental Privilege Log, such as “American Family Claim File Log–entry re:  
 meeting with legal,” are sufficient.

To the extent Plaintiffs move for an order compelling Defendant to provide a  
 more detailed Privilege Log and Supplemental Privilege Log (Dkt. 67), that  
 motion should be granted. Defendant should be ordered to provide a more  
 detailed Privilege Log and Supplemental  
 Privilege Log to Plaintiffs by April 3, 2005. Parties are strongly urged to resolve  
 this dispute on their own without court intervention. Only absolutely necessary  
 motions should be filed.

17 Dkt. 82, at 9-10.

18 Parties here certify that they have conferred and attempted to resolve these discovery  
 19 disputes pursuant to Fed. R. Civ. P. 37(a)(1), to no avail. These motions followed.

20 The trial is set to begin on July 6, 2015. Dkt. 44.

## 21 DISCUSSION

Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity jurisdiction, as is the case here, apply state substantive law and federal procedural law. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

#### **A. DISCOVERY GENERALLY AND MOTION FOR PROTECTIVE ORDER STANDARD**

Under Fed. R. Civ. P. 26 (b)(1):

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

“The court should and ordinarily does interpret ‘relevant’ very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, n.12 (1978)(quoting 4 J. Moore, Federal Practice ¶ 26.56 [1], p. 26-131 n. 34 (2d ed. 1976)). “At the same time, discovery, like all matters of procedure, has ultimate and necessary boundaries. Discovery of matter not ‘reasonably calculated to lead to the discovery of admissible evidence’ is not within the scope of Rule 26(b)(1).” *Id.*, at 351-352.

Fed. R. Civ. P. 26(c) ‘Protective Orders’ provides:

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery . . . (D) forbidding inquiry into that certain matters, or limiting the scope of disclosure or discovery to certain matters. . .

Rule 26(c)(1).

#### **B. PLAINTIFFS’ MOTION TO COMPEL AND DEFENDANT’S MOTION FOR PROTECTIVE ORDER**

As stated in the prior order, Washington substantive law applies to claims of attorney-client privilege. Dkt. 82, at 7. Federal law governs assertions of work product protection. *See United*

1 *Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 965-66 (3d Cir.1988); *Lexington Ins. Co. v.*  
 2 *Swanson*, 240 F.R.D. 662, 666 (W.D. Wash. 2007). Defendant asserts that these documents are  
 3 protected by the work product doctrine. Dkts. 88, at 7 and 90, at 9.

4 Under Fed. R. Civ. P. 26(b)(3), the work-product doctrine protects from “discovery  
 5 documents and tangible things that are prepared in anticipation of litigation or for trial by or for  
 6 another party or its representative.” *See also United States v. Richey*, 632 F.3d 559, 567 (9th Cir.  
 7 2011). Where a document was not prepared exclusively for litigation (it serves a dual purpose),  
 8 “then the ‘because of test is used.” *Id.* “Dual purpose documents are deemed prepared because of  
 9 litigation if ‘in light of the nature of the document and the factual situation in the particular case,  
 10 the document can be fairly said to have been prepared or obtained because of the prospect of  
 11 litigation.” *Id.* “[C]ourts must consider the totality of the circumstances and determine whether the  
 12 document was created because of anticipated litigation, and would not have been created in  
 13 substantially similar form but for the prospect of litigation” in applying the “because of” standard.  
 14 *Id.*, at 568 (*internal quotations omitted*).

15 In support of their motions, parties have advanced different arguments for various groups  
 16 of bates stamped documents listed in Defendant’s Third Supplemental Privilege Log. This  
 17 opinion will be organized in a similar fashion.

18 1. Assertion of Privilege Before IFCA Complaint or Suit was Filed

19 Plaintiff argues that Defendant should be compelled to produce redacted bates stamped  
 20 documents #62, #82, #83, #2264, and #2290 because these documents were written and  
 21 designated as work product before the IFCA complaint or this case was filed. Defendant seeks  
 22 an order protecting it from disclosing the same documents.

As to these documents, Plaintiffs' motion (Dkt. 86) should be denied and Defendant's motion (Dkt. 88) should be granted. In regard to these entries, the log states "Log-entry: meeting with legal (Wells) regarding related legal issues" and includes the author's name. Dkt. 87-1, at 2-3 and 7. Plaintiffs point to no authority that a complaint has to be filed in order for a party to prepare documents for litigation. Defendant has made a sufficient showing that these documents were prepared in anticipation of litigation, and that good cause exists for protecting them. These documents: #62, #82, # 83, #2264, and #2290 should be protected.

## 2. Adequacy of Description in Privilege Log

Plaintiffs argue that redacted bates stamped documents #2081, #2139 ( dated 01/02/14), #2140, #2141, #2353, and #2356 in Defendant's Third Supplemental Privilege Log are again insufficiently described in order to properly assert the privilege and so Defendant should be compelled to produce them. Defendant argues that these documents were produced in anticipation of litigation because they were created after either the ICFA Complaint was filed or after this lawsuit was filed and so are privileged.

Under Fed. R. Civ. P. 26(b)(5)(A)(ii)

When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Plaintiffs' argument is well taken. Despite having already been given an opportunity to supplement the log, Defendant has again failed to adequately describe these documents. Document #2081 has a description of "[a]ctivity record after 10/2/13 Date of IFCA Suit Notice," Documents #2139 (dated 01/02/14), #2140, #2141 provide only: "Document/image log-note after

11/1/2013–Date Litigation Commenced’ and Documents #2353 and #2356 are described as “Claim file notes/entries re: peril after 10/02/13–Date of IFCA Suit Notice.” Dkt. 87-1, at 4-7. Defendant has not “described the nature of the documents . . . in a manner that . . . will enable other parties to assess the claim.” Defendant’s argument that further description of the document would waive the privilege is unavailing. Some additional information could be provided. Defendant should be given one last opportunity to supplement its privilege log to describe bates stamped documents #2081, #2139 ( dated 01/02/14), #2140, #2141, #2353, and #2356 in sufficient detail so that the Plaintiffs and the Court can assess the assertion of the privilege. Such supplement should be provided to the Plaintiffs within two weeks of this order.

### 3. Appraisal Related Documents and a Property Investigation Report

Plaintiffs argue that Defendant should be compelled to turn over redacted bates stamped documents #21, #2215 (dated 01/07/14), #2219 and withheld bates stamped documents #19 (dated 11/19/13), #19-20, #20 (dated 10/23/13), #2217 (dated 11/8/13), #2218 (dated 10/23/13 and 10/10/13) because they all relate to post suit appraisals and appraisal is an ordinary activity contemplated under the policy. Plaintiffs also argue that Defendants should be compelled to turn over withheld bates stamped documents #2369-2372 arguing that this ‘Property Investigation Report’ was created in the ordinary course of business and so is not protected by privilege. Defendant moves for an order protecting these documents.

Plaintiffs’ motion to compel (Dkt. 86) should be denied and Defendant’s motion (Dkt. 88) should be granted as to redacted bates stamped documents #21, #2215 (dated 01/07/14), #2219 and withheld bates stamped documents #19 (dated 11/19/13), #19-20, #20 (dated 10/23/13, #2217 (dated 11/8/13), #2218 (dated 10/23/13 and 10/10/13), and #2369-2372. Defendant properly points out that these documents were created after the ICFA Complaint had been filed and the

parties were engaged in a dispute over the value of the claims. Although these documents were likely not prepared exclusively for litigation, Defendant has shown that the documents were prepared “because of the prospect of litigation.” *Richey*, at 567-568. It has shown that the documents “would not have been created in substantially similar form but for the prospect of litigation.” *Id.* Further, it has shown good cause for their protection from disclosure.

#### 4. Other Documents Mentioned in the Motions and Plaintiffs’ Motion for Costs

Plaintiffs move for an order compelling Defendants to turn over withheld bates stamped documents #2073-2080, #2125-2138, #2351-2352, and #2355. Defendants move for an order protecting these documents.

Plaintiffs’ motion (Dkt. 86) should be denied and Defendant’s motion granted as to withheld bates stamped documents #2073-2080, #2125-2138, #2351-2352, and #2355. These documents are described as “[a]ctivity record after 11/1/2013–Date Litigation Commenced re lawsuit and litigation strategy,” or “[c]laim file notes/entries re: peril after 11/1/2013 Date Litigation Commenced - re litigation strategy and lawsuit.” Dkt. 87-1, at 9 and 11. Defendant properly points out that Plaintiff failed to articulate a basis for compelling these documents. Defendant sufficiently demonstrated good cause for their protection.

Plaintiffs’ motion for costs associated with bringing their motion should be denied. Plaintiffs did not prevail on a majority of the motion and there is no basis to award costs.

### **ORDER**

Therefore, it is hereby **ORDERED** that:

- Plaintiffs’ Renewed Motion to Compel Production of Documents from Defendant

(Dkt. 86) **IS:**



- **DENIED WITHOUT PREJUDICE** as to redacted bates stamped documents #2081, #2139 ( dated 01/02/14), #2140, #2141, #2353, and #2356 in Defendant's Third Supplemental Privilege Log; and
- **DENIED** in all other respects; and
- Defendant American Family Mutual Insurance Company's Renewed Motion for Protective Order (Dkt. 88) **IS:**
  - **DENIED WITHOUT PREJUDICE** as to redacted bates stamped documents #2081, #2139 ( dated 01/02/14), #2140, #2141, #2353, and #2356 in Defendant's Third Supplemental Privilege Log; and
  - **GRANTED** in all other respects; and
- Within two weeks of this order, Defendant **SHALL** supplement its Third Supplemental Privilege Log regarding redacted bates stamped documents #2081, #2139 ( dated 01/02/14), #2140, #2141, #2353, and #2356 in Defendant's Third Supplemental Privilege Log.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 5<sup>th</sup> day of May, 2015.



ROBERT J. BRYAN  
United States District Judge